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No. 82-1100

In The

Supreme Court of the United States

October Term, 1982

KEARNEY & TRECKER CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

(Formerly the United States Court of Claims)

REPLY BRIEF FOR PETITIONER

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March 18, 1983

COCKLE PRINTING CO., 1211 Douglas St., Omaha 68102

QUESTIONS PRESENTED

Is a partial, temporary taking of control over a manufacturer's facility a taking under the Firth Amendment?

Did the Directive issued to Kearney & Trecker Corporation by the United States Department of Commerce, Office of Industrial Mobilization, to change its production schedule, which change delayed deliveries to customers of Kearney & Trecker Corporation, and which delays resulted in a cancelled order, constitute a compensable partial taking of Kearney & Trecker Corporation's property?

PARTIES

The parties to the proceedings in the United States Court of Claims, the judgment of which is sought to be reviewed, are all listed in the caption of this case in this Court. Kearney & Trecker Corporation is a wholly owned subsidiary of Cross & Trecker Corporation.

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No. 82-1109

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. It is clear from the United States' Brief in Opposition to the Petition for Writ of Certiorari of Kearney & Trecker Corporation that the government remains confused about the central issues before this Court. As a result, the government's Brief in Opposition does little to place in focus the important and far-reaching implications of Kearney & Trecker's Petition.

From the outset of this case, the government has sought to defeat Petitioner's claim through an exercise of creative semantic license.

The simple act of labelling Kearney & Trecker's injury as "consequential damage" has, it would appear, enabled the government to press into the battle the "settled law" on the nonrecovery of "consequential damages" in the Fifth Amendment/taking context. The government's reading of the law as "settled" is of course inconsistent with the first words in the opinion of the court below: "In this case of first impression . . .". 688 F. 2d at 781.

The real weakness of the government's position, however, can best be seen by reference to the cases which it cites in its Brief in Opposition, several of which are offered by the government to support its contention that the Fifth Amendment does not mandate compensation for "lost profits".

Although nowhere in its filings with either the Court of Claims or this Court has Petitioner sought compensation for something called "lost profits", a brief analysis of the government's authority for this proposition is useful because it demonstrates the government's lack of understanding of what injury was suffered by Petitioner.

Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871), actually stand for the proposition that where the sovereign does some act and as an unintended result of that act some person is indirectly injured, no compensation is mandated by the Fifth Amendment. This Court, in *Legal Tender Cases, supra,* offered the example of the sovereign's declaration of war resulting in some later, indirect injury.

Such is clearly not the case here. The government intended to do what it did, and did exactly what it intended to do. It knew the expected result and achieved that result. No speculation, chance or coincidence was involved. In the furtherance of its purposes, the government appropriated to itself Petitioner's right to the control of its production schedule, production facilities, and investment-backed production expectations.

Mitchell v. United States, 267 U.S. 341, 345 (1925), cited by the government, held that damages resulting from a loss or destruction of a business incidental to a taking of land are not recoverable as a part of the compensation for the land taken. Again, the relationship is indirect. Nothing in *Mitchell* speaks to the issue of direct taking exemplified by this case.

R. J. Widen Co. v. United States, 357 F. 2d 988, 994 (Ct. Cl. 1966) is merely a restatement of the familiar principle that the sovereign must pay for what it takes, not what the owner lost. Nothing in *R. J. Widen, supra,* precludes the possibility that what the sovereign takes may in some cases be identical to what the citizen loses. The government has never understood that in this case Petitioner's reasonable profit expectations are merely a convenient measure of the value of the taking for which it seeks compensation.

In *Georgia-Pacific Corp. v. United States,* 640 F. 2d 328, 361 (Ct. Cl. 1980), the plaintiff had been paid the fair market value of a gravel deposit site which had been taken by the United States. Plaintiff alleged that it would then have to pay more for gravel at another site, and sued the government for the probable difference in price. Com-

pensation was properly denied for plaintiff's speculative future losses.

T. O. F. C. Inc. v. United States, 683 F. 2d 389, 395-396 (Ct. Cl. 1982) is wholly inapposite to the present case. In that case compensation was sought by a plaintiff which had management contracts for the operation of apartment buildings which had been taken by, and for which compensation had already been paid by, the government. Again, the alleged injury was clearly indirect or tangential.

In its brief the government reminded this Court that it has, in another context, observed that "businessmen engaged in . . . federally . . . regulated enterprises accept the burdens as well as the benefits of their trade . . .". *Almeida-Sanchez v. United States,* 413 U.S. 266, 271 (1973). How different from this case the context of that search and seizure case actually was can readily be seen by reference to this Court's opinion:

> Two other administrative inspection cases relied upon by the government are equally inapposite . . . [B]oth approved warrantless inspections of commercial enterprises engaged in businesses closely regulated and licensed by the government . . . the Court stressed the long history of federal regulation and taxation of the manufacture and sale of liquor . . . [and] licensed gun dealers. *Id.*

Notwithstanding the irrelevance of *Almedia-Sanchez* to Petitioner's claim for just compensation, the language quoted by the government does serve to help focus again the real question before this Court: Should the injury suffered by or burden placed on Petitioner be shared alone by Petitioner and those similarly situated, or should those

who receive the benefit of defense preparedness—the entire society—share in bearing this burden?

The government has cited 4 J. Sackman, *Nichols on Eminent Domain* § 13.33 (3d ed. 1981) to support its conclusory contention that Petitioner seeks compensation for "lost profits", which are "consequential damages" and therefore not compensable under the Fifth Amendment. The treatise referred to actually contains an excellent discussion of the distinction between compensable and non-compensable takings. According to the author, one primary distinction to be made is whether the taking consisted of a direct appropriation of contract rights, which would be compensable, or merely the frustration of contract resulting from the appropriation of the subject matter (as in *T. O. F. C. v. United States, supra*).

More to the point of this case, the same author had this to say about "consequential damage" in the eminent domain context:

> The term "consequential damage" is ambiguous in character, and is not truly relevant to any discussion respecting the different classes of damage. In the proper sense of the term, all damages must of necessity be consequential, since all damage is the consequence of an injurious act. The use of the term introduces an equivocation which is detrimental to any hope of a clear settlement of the question. It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes the term is used to denote damage which, though actionable, does not follow in point of time upon the doing of the act complained of. The term has been characterized as consequential damage to an actionable degree. The distinction seems to be between less and more remote damage, and, in the last analysis, seems

to be purely a matter of degree. 4A J. Sackman, *Nichols on Eminent Domain* § 14.01 (3d ed. 1981).

The government's mere designation of Petitioner's injury as "consequential damages" clearly fails to address the issue in this action.

Notwithstanding the government's reading of *Kimball Laundry Co. v. United States*, 338 U. S. 1 (1949), the holding of that Fifth Amendment case provides considerable assistance to a proper understanding both of Petitioner's injury and a basis for compensation of that injury.

The teaching of *Kimball* was that certain "things", corporeal or incorporeal, have a general demand or value which is potentially transferable from one owner to another. On the other hand, some values are not transferable, such as an owner's unique need for property or idiosyncratic attachment to it.

In *Kimball* this Court said that "value compensable under the Fifth Amendment is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalence," *Id.*, 338 U. S., at 5, and found that Kimball's control of and use of its laundry trade routes had such a transferable value.

So also do Kearney & Trecker's use and control of its production facilities, production schedule and economic expectations have a transferable value. Can anyone doubt that some private concern would have had to pay dearly for the rights the government seized from Petitioner?

The government would have this Court say that the appropriation by the government of Petitioner's right to produce and sell one Modu-line, which is an 18-month proj-

ect, is not a compensable taking. Is the same true with respect to two Modu-lines? One-half of all the Modu-lines Petitioner can produce in a year? All such Modu-lines? All of Petitioner's production? The principle remains the same. The quality of the injury is the same, only the quantity differs.

Is the government required to pay just compensation only when it takes a square mile of land, but not an acre? Would the holding in *Kimball, supra,* have been otherwise if the government had taken only a portion of Kimball's trade routes?

2. The government also contends that Petitioner failed to exhaust its administrative remedies, as it contended in the Court below in support of its motion for summary judgment. Although this contention was not a part of the decision below, it is significant that in support of this position the government itself admits that "there is no provision for monetary relief" in its administrative remedy structure.

This fact of course explains why Petitioner "failed" to exhaust the administrative remedies. Petitioner's injury could only be remedied by monetary relief.

The same fact is yet another consideration which operates in favor of the grant of certiorari in this case: at present no proper redress exists for such takings as the one for which Petitioner seeks just compensation.

3. The final point raised in the government's brief is the contention that since the position of Petitioner has apparently never been advanced before, no hardship must exist for manufacturers such as Petitioner, the case is

therefore not important, and certiorari should therefore be denied. The logic of that theory of constitutional law speaks for itself, and it should be disregarded by this Court.

CONCLUSION

This Court should grant certiorari forthwith, and finally resolve the important constitutional question posed by this case.

Respectfully submitted,

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